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No.

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In The
Supreme Court of the United States

JEROME J. MIEZIN and
PATRICIA MIEZIN,

Petitioners,

v.

MIDWEST EXPRESS AIRLINES, INC. and
ABC INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari
To The Wisconsin Court Of Appeals, District I

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Can Midwest Express Airlines be found liable under Wisconsin's common law for failure to warn the plaintiff-petitioner of the dangers of deep venous thrombosis while a paying passenger on a commercial airline flying within the United States? and:
2. Is the Federal Aviation Act the sole and controlling criterion over a domestic airline's duties to its paying passengers?

PARTIES

Jerome J. Miezin and Patricia Miezin

Petitioners,

-vs-

Midwest Express Airlines, Inc.

Respondent.

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OPINIONS BELOW

The opinion of the Wisconsin Court of Appeals, District I, filed on May 17, 2005, is published and reproduced in the Appendix at App. 1. The citation of the published opinion is 701 N.W. 2d 626. The denial of the rehearing from the Wisconsin Supreme Court was on August 25, 2005.

THE JURISDICTION OF THE SUPREME COURT

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(a) and 49 U.S.C. § 40104, Promotion of Civil Aeronautics and Safety of Air Commerce.

STATUTORY PROVISIONS

The statute in question is the Federal Aviation Act of 1958, 49 U.S.C. § 40101.

49 U.S.C. § 40104, Promotion of Civil Aeronautics and Safety of Air Commerce.

(a) Developing civil aeronautics and Safety of Air Commerce. The Administrator of the Federal Aviation Administration shall encourage the development of civil aeronautics and safety of air commerce in and outside of the United States. In carrying out this subsection, the administrator shall take action that the Administrator considers necessary to establish, within available resources, a program to distribute civil aviation information in resources, a program to distribute civil aviation information in each region served by the Administration. The

program s' provide, on request, informational material and exper. on civil aviation to State and local school administrators, college and university officials, and officers of their interested organizations.

STATEMENT OF THE CASE

Jerome J. Miezin and his wife, Patricia Miezin, are residents of Franklin, Wisconsin, and are husband and wife. Jerome is employed at the Matavante Company as a district supervisor.

Midwest Express Airlines, Inc., now known as Midwest Airlines, is a domestic commercial airline carrier which carries passengers for hire from various cities and destinations in the United States and Canada, mostly in the United States. The airline has an excellent reputation in the midwest for timeliness, comfort, and good meals. Its principal office is located in Milwaukee, Wisconsin.

On October 15, 1999, Jerome Miezin and Patricia Miezin flew from Milwaukee, Wisconsin, to Boston, Massachusetts, as fare paying passengers on a Midwest Airlines flight. They were traveling on a week's vacation with two friends of theirs. They returned to Milwaukee by flying a Midwest Airlines flight from Boston to Milwaukee, on October 23, 1999.

Jerome is an individual who likes to stay fit and belongs to an athletic club and runs (jogs) frequently.

The couple returned to Milwaukee on Saturday night, October 23, 1999, and on Monday, October 25, 1999 while working out at his athletic club Jerome began to feel a "heaviness" in his right leg and when his wife later noticed

the leg was considerably swollen she advised him to see his doctor. Jerome did seek medical care and was hospitalized and tested and diagnosed to have a deep venous thrombosis in his right leg.

After approximately a week in the hospital Jerome was diagnosed as having a "positive factor V leiden mutation" which predisposes him to blood clots and which factor obviously preceded the airline flight to Boston and to Milwaukee.

After his medical advisors advised Miezin that the swelling in his leg was permanent and his other symptoms would likely be permanent, Miezin retained counsel and advised Midwest Airlines of his injury. Miezin's Summons and Complaint was filed on October 22, 2002 in the Circuit Court of Milwaukee County under Case No. 02-CV-010249.

Plaintiffs-appellants' action was filed in the State Circuit Court as they reside in Franklin, Wisconsin, a suburb of Milwaukee. The action was commenced against Midwest Express Airlines, Inc., a domestic corporation with its principal place of business at General Mitchell Field in Milwaukee.

The Miezins blame the injury on the common law negligence of the agents and employees of Midwest Airlines. The specific claim is that Midwest failed to give any warnings of the dangers of deep venous thrombosis arising from airline travel and in specifically failing to advise the Miezins and specifically Jerome Miezin that he should get up out of his seat and move around the cabin of the aircraft and exercise his toes and feet and lower legs and upper legs to promote circulation in those body parts and to drink liquids and wear loose clothing and avoid stockings or socks with tight elastic below the knees and to get

up and walk about the cabin at least once an hour and to massage his toes, feet, ankles, lower legs and knees and exercise his calf muscles to stimulate blood circulation and generally failing to advise him to exercise during his flights to promote circulation in his legs and throughout his entire body.

Jerome Miezin did not know of his history of a positive Factor V Leiden mutation until after his injury was diagnosed. As a result of his injury Jerome Miezin and his wife suffered damages which included substantial medical bills, both past and future, a loss of income and permanent disability and disfigurement. Both Miezins were deposed at length and Dr. Larry S. Milner, M.D. who is a Board Certified Hematologist, a Board Certified oncologist, and also Board Certified in Internal Medicine was named by the plaintiffs as an expert.

Dr. Milner reviewed all of Miezin's medical records and rendered his expert medical opinion that the 2-hour plane ride that he took just prior to his being diagnosed with venous blood clots in his leg was a factor in the development of those blood clots due to his underlying positive Factor V Leiden mutation.

In addition to his expert medical opinion Dr. Milner completed a survey on "the relationship between deep venous thrombosis and air travel" and that survey is attached to this Petition. Petitioners contend that based upon his education, medical training, experience, his review of Mr. Miezin's medical records, and Dr. Milner's survey of the available medical literature on this issue as of October 27, 2003 he, Dr. Milner, has established a duty on the airline's part to warn its passengers of the dangers of deep venous thrombosis in air travel.

At this point in the action Mr. Miezin's injury and permanent disability are undisputed.

THE PROCEDURAL STATUS OF THE CASE

After completion of the discovery proceedings requested by the parties, Midwest brought a motion for summary judgment which was heard and granted by the trial court on November 10, 2003. Petitioners took an appeal to the Wisconsin Court of Appeals which was decided on May 17, 2005.

THE DISPOSITIONS IN THE TRIAL COURT AND COURT OF APPEALS

Judge Mel Flanagan, Circuit Judge, heard the defendants-respondents' motion for summary judgment on November 10, 2003 and granted it on that date.

Petitioners filed an appeal in the Wisconsin Court of Appeals which was decided on May 17, 2005, affirming the trial court decision.

Petitioners believe that all the facts relevant to the issues presented for review are in the record and included in the opinion of the Court of Appeals.

Petitioners submit that this is a case of first impression in Wisconsin State Courts because appellants' counsel has been unable to find any state cases which consider the issue of DVT arising from airline travel in Wisconsin. The facts of the personal injury are undisputed in that Jerome Miezin was diagnosed with a deep vein thrombosis several

days after returning to Milwaukee on a Midwest Airlines flight.

Miezin filed this action alleging that he had suffered permanent disability and disfigurement as a result of the deep vein thrombosis which he claims developed because Midwest negligently failed to advise him or warn him before and during the flights from Milwaukee to Boston and Boston to Milwaukee of the dangers of deep venous thrombosis.

The trial court granted summary judgment concluding that Miezin's state common law negligence claim is preempted by the Federal Aviation Act and, in the alternative, that Midwest had no duty under Wisconsin common law to warn airline passengers about the dangers of DVT.

ARGUMENT

The Wisconsin Court of Appeals, District I, in its Decision of May 17, 2005 correctly designates the issue on appeal as "At issue in this case is whether a plaintiff can pursue a state common-law negligence claim alleging that an airline negligently failed to warn passengers about the dangers of deep vein thrombosis ("DVT"), or whether such claims are preempted by Federal law." (1st District Court of Appeals Decision, p. 2)

The Miezins claimed that the trial court erroneously granted summary judgment in Midwest's favor "after concluding that Miezin's state common-law negligence claim is preempted by Federal law and, in the alternative, that Midwest had no duty under Wisconsin common law to